

4922. Adulteration of oysters. U. S. * * * v. 408 Bushels of Oysters in the Shell. Tried to the court and a jury. Verdict in favor of the Government. Decree of condemnation and forfeiture. Claimant ordered to pay stipulated value of the merchandise and the costs of the proceedings. (F. & D. No. 7036. L. S. No. 1940-1. S. No. E-474.)

On November 6, 1915, the United States attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 408 bushels of oysters in the shell, consigned by Azel F. Merrell, and remaining unsold and unloaded from the ship at New York, N. Y., alleging that the article had been shipped on or about November 6, 1915, and transported from the State of New Jersey into the State of New York, and charging adulteration in violation of the Food and Drugs Act.

Adulteration of the article was alleged in the libel for the reason that it consisted in particular [part] of a partially filthy, decomposed, and putrid animal product, to wit, polluted oysters.

On November 12, 1915, an order was signed by the court, upon stipulation of the parties, releasing the oysters under seizure to the said Azel F. Merrell, claimant, upon the filing of a bond in the sum of \$510, the order providing that the oysters should be placed and permitted to remain until after the trial of the action, not to exceed two months, in an oyster bed leased by claimant at Princess Bay, Richmond County, N. Y., and that the amount of the bond should be paid to the United States in the event a final decree of condemnation should be entered.

On March 6, 1916, the case came on for trial before the court and a jury, and, after the submission of evidence and arguments by counsel, the following charge was delivered on March 16, 1916, to the jury by the court (Hand, D. J.):

Gentlemen of the Jury: I will first, before beginning a more general discussion of the case, charge certain propositions requested by the counsel for the defendants. In order to consider the conclusions of the Government experts, the jury must first find that the Government has proved all the facts submitted to its experts in its behalf, because otherwise, the conclusion of the Government experts would be based upon an incorrect premise. I charge that so far as it relates to the opinion of the Government experts, expressed in answer to the hypothetical question.

If the jury shall find that any facts alleged in the Government's hypothetical question have not been established by a preponderance of evidence, then the jury must not consider either the conclusions nor the evidence of the Government experts in answer to the hypothetical question, in arriving at its verdict. If the jury shall find the testimony of Professor Gorham and other Government experts is based upon any fact that the Government does not prove by a preponderance of evidence, then the jury shall in arriving at its verdict disregard the testimony of these experts as to such matters. You are not bound to accept the scoring system, but you must pass on the question of whether or not filth was or was not present in a substantial amount. If you find it was not, you must find for the claimant. You must give the same weight to the testimony of the experts testifying for the defendants as to that of the experts appearing for the Government, if you find that they have equal qualifications. The United States Department of Agriculture has no right or authority to condemn oyster beds or prohibit their use for growing oysters for shipment in interstate commerce or otherwise.

If you find that sewage in fact did not reach these particular oyster beds, you will disregard all testimony as to the amount of sewage going into Jamaica Bay. If you find that these oysters in fact did not contain filth at the time they were seized, you will then disregard all testimony in reference to Jamaica Bay or any other place in which the oysters may have been. There is no evidence in this case that these oysters were unhealthy. For that matter, the question of health is not involved under this statute. The testimony of Dr. Parsons as to the number of coli he found in the oysters, is a statement of fact. The statements of Miss Noble of the Board of Health of the City of New York and the representative of the Lederle Laboratory as to the number of coli that they found in the oysters, are also statements of fact, but the inference

that experts draw from these statements of fact are opinions, which you can accept or reject. There is no legal standard of 50 for oysters, and the United States Department of Agriculture has no right or authority to accept such a standard. If you find that the testimony of Miss Noble of the Department of Health of New York City, and of the representative of the Lederle Laboratories as to the coli test is untrue, you must then consider whether or not there was filth present in a substantial amount, and if you find there was not, you must find for the claimant.

You must remember that Miss Noble of the Department of Health of the City of New York was an uninterested witness. Therefore, give due weight to her testimony, if you believe it to be true.

In charging these facts which have been requested by defendant's counsel in regard to the Department of Agriculture, I don't mean to say that they are not right in taking certain stands in the matter which they have, as to a fifty count, or anything else, which they deem proper and in conformity with the law. All I mean to charge you is, and all I imagine that defendant's counsel asks me to charge is, that any pronouncement in that regard by them is not binding on this Court here; that the question you will have to determine is whether in fact there was a substantial amount of filth in these oysters.

I decline to charge the other requests, and I have marked them, Mr. Carlin; they will appear on those pages.

Mr. CARLIN. Thank you.

The COURT. Now, gentlemen of the jury, this question before you here is a question arising under the Food & Drug law, as it is commonly called. It is not a question of health, as submitted to us here. It is purely a question of whether these oysters, these 408 bushels of oysters, which were libelled by the Government, were filthy within the meaning of the Pure Food Act.

This is a case, as the Government views it, that is of importance to the Government and importance to the public. You would realize that from the number of experts that have [been] called, and the amount of attention they have given to it. It is also a case which is of great importance to the oyster growers who maintain that industry at Jamaica Bay. These considerations, however, can have no place here in your deliberations, except in a single respect in which they must affect any man who has a part in this proceeding, and that is that it undoubtedly fills you, as it does me, with an added sense of responsibility in dealing with the question.

But the only question for you to consider is the somewhat narrow, legal question, as to whether the 408 bushels of oysters were filthy or not at the time they were seized by the Government. You gentlemen are the sole judges of the facts in this case. You are to take the law as laid down by me. If I indicate, or have appeared to indicate at any time during the trial that I had any opinions in regard to the facts, you are entirely at liberty to disregard it, because you are the sole and absolute judges of the facts in this case.

In the first place, what is filth? What does it mean? I think that both counsel in this case would take the dictionary definition which I think Mr. Barnes gave in his summing up, nasty, foul, or dirty. It has no technical significance. It has a practical significance.

I also charge you, that for these oysters to be regarded and held by you as filthy, the filth or degree of filth, must be substantial. In saying that I do not necessarily mean to indicate that filth which is microscopic so far as observation goes, that is so small in quantity that you cannot see it with the naked eye, may not be substantial in amount. Under all the circumstances, if you should find that a substantial portion of human excrement was in these oysters, you may find that they were filthy to a substantial extent, even though the filth was present to a degree that can be only observed under a microscope. It is for you to say, gentlemen, under all the circumstances, taking into account the character of the product and the character of the filth, if you find any, whether or not these oysters were filthy to a substantial degree.

It is for the Government to prove by the preponderance of evidence that these oysters were filthy to a substantial degree, and if you find that they have failed to do that, if after considering all the evidence you are in doubt, then it is your duty to find for the defendant.

Some of the experts, gentlemen, say the tests are unreliable. Some say they could not give an opinion unless they knew whether the beds were in a place likely to be polluted. Others say the presence of *B. coli* alone in large scores indicates the presence of sewage and other animal excrement. Some say Jamaica Bay was polluted. Others that it was not. The testimony of Mr. Parsons gives high scores, that of Miss Noble, examining for the City of New

York, low scores; that of the Lederle Laboratories, low scores; that of Schwartz, low scores. Are the tests correct? Were the oysters submitted genuine? In other words, were they fair specimens and fair tests in these different scores? You must analyze all the evidence and discover the truth. It is for you gentlemen to do the hard work of deciding when doctors disagree. You may consider the amount of sewage poured into Jamaica Bay, the testimony of the experts who say it reaches the beds, the testimony of those who say it never could have reached the beds, or if so, only when dead and mineralized. All these facts are for your consideration. You have heard a vast amount of testimony, a vast amount of very novel and very interesting testimony. You heard the argument and conflict of the experts, and you have heard all the facts, and it all boils down to the very simple proposition of law, for you to determine upon these facts whether these oysters were substantially filthy or not.

There is one other thing which I have not mentioned: Certain oysters were examined, other oysters were not examined. The oysters examined, were, of course, very few as compared with the large bulk of 408 bushels of oysters. If you condemn the other oysters, which have not been tested here at all, that is, individually, specifically, you will have to find, of course, in the first place, that there was substantial filth in the oysters that were examined; in the second place that those were fair specimens, so that the other portion of the 408 bushels were similar, and would be properly condemned with those that were actually found to contain excrement. So the question is first whether any of these oysters were filthy to a substantial degree. If you find the oysters actually examined were filthy, to a substantial degree, and that is the result of your finding, and you find there is a preponderance of evidence to that effect, then those would be condemned. If you find they were fair samples of the rest, then you would condemn the rest.

I hope, and I believe I am perfectly clear. It is a narrow question to be determined, and involves the consideration of a large amount of conflicting evidence, and that, gentleman, if [is] your province.

Mr. BARNES. Will your Honor allow me an exception? I think very likely your Honor did not intend to charge—I except to your Honor's charge that the jury must give the same weight to the testimony of experts for the defense as to that of the experts testifying for the Government, if you find they have equal qualifications.

The COURT. I mean by qualifications, Mr. Barnes, qualifications in all senses, as to ability and reliability, truthfulness and experience.

Mr. BARNES. That is all I want your Honor to charge, that the question of credibility of witnesses is exclusively for the jury.

The COURT. It is exclusively for the jury.

Mr. BARNES. I will read another request: There is no evidence in the case that Mr. Holborow, a city official, did not deliver the samples just as he took them, and in the absence of evidence to that effect you must accept his testimony, unless you say he is unworthy of belief.

The COURT. I so charge.

Mr. BARNES. I except.

Mr. CARLIN. I respectfully ask your Honor to charge that if the jury finds that samples from this shipload of oysters scored under fifty, they must find for the claimant upon all the evidence.

The COURT. I decline so to charge.

Mr. CARLIN. Exception.

The COURT. The question as to what is a substantial degree of filth here, is one for the jury.

Mr. CARLIN. I except.

The COURT. You may retire.

The jury thereupon retired, and, after due deliberation, returned into court with a verdict favorable to the United States.

Thereafter, on March 22, 1916, a decree of condemnation and forfeiture was entered and the merchandise condemned, having theretofore by order of the court been delivered to said claimant under the stipulation for value in the sum of \$510 referred to above, and the costs having been taxed at the sum of \$75.15, it was ordered by the court that the United States recover of the claimant the value of the merchandise, as stipulated, together with the costs of the proceedings, making in all the sum of \$585.15.

R. A. PEARSON, *Acting Secretary of Agriculture.*